LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 24 1974
MICHAEL RODAK, JR., CLERK

No. 73-1506

# In the Supreme Court of the United States

OCTOBER TERM, 1973

---

HARLAN #4 COAL COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

PETER G. NASH,
*General Counsel,*
*National Labor Relations Board,*
*Washington, D.C. 20570.*

# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1506

HARLAN #4 COAL COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. On September 23, 1971, a Board-conducted representation election [1] was held at three of the Company's mines which resulted in 43 votes for the United Mine Workers Union (the "Union"), 1 vote for the Intervenor,[2] 16 votes against the participat-

[1] An earlier election was set aside by the Board based on objections filed by the Union (Pet. App. 19a).

[2] The Southern Labor Union, Local No. 325, filed a petition seeking to represent a unit of employees at one of the Com-

ing labor unions, and 9 challenged ballots (A. 6(b)). The Company filed timely objections to the election, contending that (1) the Union gave the impression of surveillance of the voters, made material misrepresentations concerning the federal wage freeze, disseminated false information that the Company had coerced and intimidated its employees; and (2) the ballot's provision for a "neither" vote was misleading (A. 3-5). The Regional Director overruled the objections and certified the Union as the bargaining representative of the employees in the appropriate unit (A. 22). The Company's request for review was denied by the Board (Pet. App. 20a-21a).

The Company refused to bargain with the Union, the Board found the Company's refusal violative of Section 8(a)(5) and (1) of the National Labor Relations Act, and issued a bargaining order (Pet. App. 23a, 26a-27a). The court of appeals enforced the Board's order (Pet. App. 16a).

2. The petition challenges only the Board's finding that a letter sent to the employees by the Union shortly before the election did not constitute grounds for setting aside the election. The letter stated in relevant part:

> Since the last election the company has been sold to U.S. Plywood-Champion Paper, Inc. This [is]

---

pany's mines here involved. Thereafter, the Regional Director ordered that union's name to be placed on the ballot herein (A. 22).

"A." references are to the printed appendix to the briefs in the court below.

> one of the largest corporations in the world, and can easily pay the union scale. It is reported that they paid five million dollars to Bill Conley and his associates, including Frank Qualls. Don't be mis-led [sic] by them coming to you now and saying that they are unable to pay the contract. You are aware that your wages are frozen by the action of President Nixon, but if you vote for the United Mine Workers of America, you can get the union contract wages and other conditions. We urge you to think about this for the benefit of yourself and your family. [A. 5a.]

The Company contended before the Board that the statement constituted a material misrepresentation because it incorrectly claimed that the Union could avoid the legal effect of the wage-price freeze (A. 4, 9-10). In support of its position, the Company submitted signed identical statements from eight employees asserting that their votes for the Union were influenced by this alleged misrepresentation since it led them to believe that, if the Union won the election, they would receive the present union contract wages and other benefits immediately (A. 9, 13).

The Regional Director, whose findings the Board adopted, concluded that the letter did not warrant setting aside the election. He pointed out that, even though "the alleged improper statement could be subject to the interpretation that if the employees voted for the Union, they would avoid the legal effect of the wage freeze," "employees are also aware that no wage increases of any kind could be obtained by the Union in negotiation with the employer unless the

employer agreed to such wage increases" (A. 6(h)). He found that the Company campaign letters "clearly indicate that the employer will resist such wage increases" (A. 6(h), 6(k)-(n)). The Regional Director also discounted the eight affidavits, explaining that "the Board has consistently refused to accept post-election statements regarding the intent of voters as a basis for setting aside elections or changing the results of secret ballots" (A. 6(h)).

The court of appeals, citing *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608, agreed that post-election "statements of voter intention [cannot] impeach the validity of secret ballots" (Pet. App. 9a-10a). The court further found that, while:

> the letter is subject to the interpretation that if company employees voted for the union they would immediately obtain union scale wages * * * [it] is equally subject to the interpretation that the union could obtain for employees contract wages as soon as it was legal to do so—as soon as the freeze was ended. The letter is at worst delphic and inartistic. It may have been intended to persuade employees that a temporary wage freeze should not dissuade them from voting for the union. [Pet. App. 13a.]

The court concluded:

> Even if the letter is interpreted as the company would have us do, the Board did not err in concluding that the misrepresentation i[t] conveyed did not have a real impact on the election. Information about the wage freeze was not with-

> in the special knowledge of the union. It had been widely publicized and debated. And, the federal government had established places where answers to specific questions about the freeze could be obtained. Moreover, the Regional Director found, and his finding is not unsupported, that the employees were aware that any increase in wages would have to be agreed upon by the company and that the company had stated several times that it would not agree to an increase. For all these reasons, the findings of the Board have evidentiary support and should not be set aside. [Pet. App. 13a-14a.]

3. The issue presented in the petition (Pet. 4)—whether an election should be set aside where the employees are "subject to deliberately false information pertinent to a material issue which is calculated to influence dishonestly their voting decision" is not raised on this record. For the court below found that the Union's letter could not be so characterized; rather it was "at worst delphic and inartistic" (Pet. App. 13a).

Moreover, even assuming the interpretation placed on the letter by the Company was correct, it does not follow that the letter would have required a setting aside of the election. Under the criteria established in *Hollywood Ceramics Co.*, 140 NLRB 221[*] (A. 6 (h), Pet. App. 11a-14a), campaign misrepresentations taint an election only "where a party has mis-

---

[*] As the petition correctly states (Pet. 9-11), the *Hollywood Ceramics* criteria have been approved by all of the courts of appeals.

represented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted" (140 NLRB at 224). Here, both the Board and court below found that the employees were in a position to evaluate the Union's letter.

In these circumstances, only factual issues are presented, which do not warrant review by this Court.[4]

---

[4] *Continental Oil Co.*, 58 NLRB 169 (1944), *Seneca Knitting Mills, Inc.*, 59 NLRB 754, 756 (1944), and *Radio Corporation of America*, 102 NLRB 124 (1953) (Pet. 11-15) are inapposite. In each of these cases, prior to an election between the incumbent and insurgent unions, the employees were improperly informed that the Wage Stabilization Board had approved a contract negotiated between the company and the incumbent union. As the court below stated (Pet. App. 14a): "The Board found that this information, to which employees did not have ready access, would have the obvious effect of making employees believe that a vote for the incumbent union would insure the previously negotiated wage increases and that a vote for the insurgent union would nullify the approved contract and perhaps cause employees to lose the approved wage increase altogether."

*Cross Baking Co.* v. *National Labor Relations Board*, 453 F. 2d 1346 (C.A. 1) is similarly inapposite. As the court below noted (Pet. App. 15a), there the misrepresentation, which concerned wage rates obtained by the union at another plant, "was within the special knowledge of the union."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

PETER G. NASH,
*General Counsel,*
*National Labor Relations Board.*

APRIL 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 537877 233